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No. 84-1942

In The
Supreme Court of the United States
October Term, 1984

NATIONWIDE MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

HENRY GERRARD CLAY,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

I. Whether this Court should consider on certiorari allegations of subjective bias or prejudice on the part of the justices of the Supreme Court of Alabama and particularly one of the justices of that Court where each of the justices determined on motion that they should not recuse themselves, the Supreme Court of Alabama as a whole declined to order the disqualification of the particular justice challenged, and the particular justice challenged neither authored the majority decision nor cast a deciding vote.

II. Whether federal constitutional challenges to the civil judgment and appeal penalty may be considered on certiorari where they were either never raised in state court or they were not raised in a timely fashion as required by state procedure.

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Respondent Henry Gerrard Clay (hereafter Clay) respectfully moves this Court to deny the Petition for Writ of Certiorari previously submitted by Nationwide Mutual Insurance Company (hereafter Nationwide).

STATEMENT OF THE CASE

In its Petition for Writ of Certiorari Nationwide continues its challenge to the jury verdict and judgment

against it which found Nationwide guilty of bad faith failure to pay its insured Clay the disability benefits to which he was entitled. The Statement of the Case submitted by Nationwide mischaracterizes the development of the law of bad faith in Alabama and omits facts critical to an understanding of the current posture of this case, particularly as those facts pertain to Nationwide's failure to assert in timely fashion the constitutional claims it now makes. Consequently, Respondent Clay offers the following additions and clarifications to the Statement of the Case:

At page 3 of its Petition Nationwide contends, "At all times material to Nationwide's review of Clay's claim, Alabama did not recognize a cause of action for bad faith failure to pay first party insurance claims." It then states that the Supreme Court of Alabama held for the first time on October 2, 1981 that a cause of action existed for bad faith. In fact, the tort of bad faith failure to pay a first party insurance claim was formally recognized by the Supreme Court of Alabama on April 10, 1981 when the case of *Chavers vs. National Security Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981), was first released,[1] following which Clay promptly amended his complaint to include such a

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1. On application for rehearing the original opinion in *Chavers* was withdrawn, resulting in the opinion of October 2, 1981 referred to by Nationwide. Insofar as recognition of the tort of bad faith and the issues before this Court are concerned, there was no practical difference between the two opinions. The recognition of this tort was widely discussed among members of the Alabama Bar and other interested parties after the April decision. *See e.g.*, Smith, *Alabama Supreme Court: Recent Decisions October Term 1980-81*, 42 ALABAMA LAWYER 417, 433-4 (1981).

claim.[2] The *Chavers* decision was the culmination of a series of cases in which the Alabama Supreme Court had "neither accepted nor rejected the tort of bad faith in first party actions" but had "indicated an increasing willingness to recognize such a cause of action given the appropriate circumstances." *Id.* at 5.

The occurrences which led up to the filing of suit in July 1978 for contract benefits are detailed in the opinion of the Alabama Supreme Court. App. A, p. 1a-12a. Nationwide answered the original complaint with a general denial stating "at this time it has still not completed its investigation." Opinion, App. A, p. 12a. In its answer to Clay's second and third amended complaints[3] Nationwide raised defenses that Clay's earnings were insufficient to authorize the benefits provided in the policy; that any benefits due were to be prorated with Clay's other disability income policies; that Clay had misrepresented his income in obtaining the policy; that, to obtain the Nationwide policy, Clay had represented he would cancel a Paul Revere policy, but instead had increased it; that Nationwide had breached no duty of good faith; that Nationwide had a lawful basis for ceasing to make payment; and that Clay "failed to mitigate his claim by undergoing corrective surgery within a reasonable period of time after becoming dis-

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2. The amendment was filed April 29, 1981 and sought damages of $1,500,000.00. Later amendments raised the *ad damnum* clause to $3,000,000.00. See Opinion, Appendix A to Petition for Writ of Certiorari, p. 13a-14a. (Hereafter references to the Appendix to the Petition for Writ of Certiorari will be abbreviated "App.").

3. Nationwide filed no answer to the first amended complaint, and continued its review of Clay's claim until March 16, 1982 when it answered the second amended complaint. See Opinion, App. A, p. 14a. Thus Nationwide's review of Clay's claim continued at least for almost a year after formal recognition of the tort.

abled."[4] Nationwide also denied having demanded premium payments from Clay subsequent to the development of his disability and presentation of his claim for benefits. Opinion, App. A, p. 14a. At no time prior to trial did Nationwide raise any constitutional challenge to the potential imposition of the tort of bad faith.

The week-long trial of this case in December 1982 resulted in a determination by the trial judge that there was "absolutely no defense" to the contract claim. He consequently directed a verdict for Clay on the contract (over the objection of Nationwide) and proceeded to calculate the benefits due under the various policy provisions (without objection by Nationwide). The bad faith claim was submitted to the jury under correct instructions taken from the case of *National Security Fire & Cas. Co. vs. Bowen,* 417 So. 2d 179, 183 (Ala. 1982) and resulted in a verdict of $1,250,000.00, in addition to the $46,165.50 due on the contract.

Following return of the verdict and entry of judgment Nationwide filed a motion for judgment notwithstanding the verdict, new trial, or remittitur. Nowhere in these post-trial motions was any mention made of the constitutional claims now asserted by Nationwide, although at this point Nationwide clearly knew that it was facing a partially punitive judgment in excess of $1,000,000.00. Similarly, on appeal to the Alabama Supreme Court the extensive briefs submitted by Nationwide never hinted at any constitutional challenge, nor was this possibility suggested in oral argument.

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4. The last defense of "failure to mitigate by surgery" was withdrawn the morning of trial.

On February 8, 1985 the Supreme Court of Alabama released its decision affirming the verdict and judgment against Nationwide. In an opinion authored by Justice Almon, six of the nine justices[5] concluded, *inter alia*, that Clay was entitled to a directed verdict on the contract, that the claim of bad faith had been properly submitted to the jury, and that the verdict was not subject to remittitur. In its subsequent application for rehearing Nationwide raised for the first time a constitutional challenge based on the Ex Post Facto Clause of the United States Constitution. *See* Application for Rehearing and Brief in Support Thereof, App. E, p. 91a-92a. At no time prior to the proceedings in this Court has Nationwide raised any claims based upon the Contract Clause or the Excessive Fine Clause, as Nationwide reluctantly concedes at page 7 of its Petition for Writ of Certiorari.

On rehearing Nationwide also first launched its attack on Justice Embry's participation in the decision in this case.[6] Because the disqualification of Justice Embry alone would not in any event alter the outcome of this case

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5. Joining Justice Almon in the opinion were Justices Faulkner, Jones, Shores, Embry, and Adams. Chief Justice Torbert and Justice Beatty dissented in part and concurred in part, while Justice Maddox dissented.

6 Justice Embry's suit against Maryland Casualty Co. (which was settled in April 1984) and his suit against Blue Cross-Blue Shield of Alabama had been matters of public record in the courts in Birmingham for over a year. His recusal in *Blue-Cross and Blue Shield of Alabama vs. Granger*, 461 So. 2d 1320 (Ala. 1984) was readily known to all those following bad faith cases in the Supreme Court by December 21, 1984 when the decision in that case was announced. Nationwide supported its Motion for Withdrawal of Opinions and Suggestion of Disqualification with an affidavit of counsel asserting that he first learned of Justice Embry's claims on February 14, 1985. App. C, p. 62a.

in light of the 6-3 decision, Nationwide claimed that the entire judicial process and all of the justices of the Alabama court were tainted by Justice Embry's participation in the decision-making process. Nationwide brought forward no independent evidence by affidavit or otherwise that Justice Embry or any other member of the Alabama court was in fact prejudiced against it, but instead based its challenge on a distorted interpretation of the development of the tort of bad faith in Alabama and its own unsupported assumptions and conclusions concerning bias on the part of the justices themselves. App. C & D, p. 31a-64a; App. E, p. 89a-91a. Nationwide's disqualification motion and related documents made no suggestion of the proper manner of determining disqualification and recusal.

On April 5, 1985 the Supreme Court of Alabama released its decision on rehearing which modified the original opinion in limited fashion and otherwise overruled the application for rehearing. All six of the justices composing the original majority concurred in this determination. App. B, p. 29a-30a. All nine of the justices concurred in the denial of the motion for withdrawal of opinion and suggestion of disqualification on the authority of *Aetna Life and Casualty Co. vs. Lavoie,* (Ms. Mar. 8, 1985), a copy of which appears in Appendix F, p. 105a-113a.[7] *See* App. B, p. 30a. The Motion for Disqualifica-

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7. This Court has docketed an appeal in this case, No. 84-1601, 53 U.S.L.W. 3759 (U.S. April 9, 1985). Probable jurisdiction has been noted on the basis of matters raised by Aetna in the state courts which were not raised by Nationwide. The original opinion in that case appears at 19 A.B.R. 272 (Ala. Dec. 8, 1984) and the rulings and opinions On Motion for Disqualification and Application for Rehearing appear at 19 A.B.R. 1147 (Ala. Mar. 8, 1985). This case will be referred to hereafter as *Aetna vs. Lavoie.*

tion in *Aetna vs. Lavoie* was referred to each individual justice to determine whether he or she was disqualified and should recuse since the matters raised were addressed "to the ethical judicial conscience of each justice applied in accordance with the established rules of law." Opinion of Torbert, C.J., concurring specially as to the ruling on the motion for disqualification. *See* App. F, p. 106a. Each of the justices voted not to recuse, and the motion was therefore denied.

The release of the Alabama Supreme Court's ruling on rehearing triggered the process of issuance of the mandate which, in an Alabama case in this posture, automatically requires imposition of the 10% supersedeas penalty pursuant to § 12-22-72, Code Ala. 1975. Although the imposition of this penalty is a natural concomitant to the posting of a supersedeas bond and subsequent affirmance of the judgment under Alabama law, all of which was certainly known to Nationwide, at no time did Nationwide challenge the application of this statute to it in the Alabama courts. Consequently, the Alabama Supreme Court was never given an opportunity in this case to consider the constitutionality of § 12-22-72.

ARGUMENT

I. A Writ of Certiorari should not be granted to review the Supreme Court of Alabama's ruling on discretionary disqualification.

In its Petition for Writ of Certiorari Nationwide fails to demonstrate how its attack on Justice Embry and the other members of the Supreme Court of Alabama presents

any basis for certiorari in this Court. The decision of the Alabama court is not in conflict with the decision of any other state court or of any of the federal courts of appeals, nor does it decide any important question of federal law. The ruling on Nationwide's motion for disqualification utilized Alabama procedure and law on a question of discretionary recusal, all of which is fully in accord with constitutional principles governing the right to a fair and impartial tribunal. Furthermore, even if Justice Embry is subject to mandatory disqualification as a matter of federal constitutional law (which he clearly is not), his disqualification alone would not result in any change in the 6-3 decision of the Alabama Supreme Court. In order to obtain relief from the judgment against it Nationwide must establish that the other members of the Supreme Court of Alabama were infected by Justice Embry's participation in this case and are, therefore, disqualified as a matter of federal constitutional law. Such a ruling by this Court would require it to reject the determination by each of the nine members of the Alabama Supreme Court that they should not individually recuse themselves, as well as their tacit conclusion that they should not require the disqualification of Justice Embry under these circumstances. Respondent Clay respectfully submits that Nationwide has shown no basis to justify on certiorari such an intrusion into the decision-making process of the justices of the Supreme Court of Alabama.

Nationwide's challenge in the state court was based on section 3C(1) (*d*) (*ii*) of the Alabama Canons of Judicial Ethics, as well as more general state statutory provisions. *See* Motion, App. C, esp. p. 36a-37a. Its focus seems to have changed in this Court for it now claims that

Justice Embry had "a substantial financial interest in the outcome" of the case at bar. *See* Petition p. 10 & 11. A contention of this type rests on section 3C(1) (*c*) and the definition of financial interest provided in Canon 3C, an approach not taken by Nationwide in the state court. In either event, it is clear that disqualification is discretionary and not mandatory, and that Justice Embry has no "interest" in the outcome of this proceeding that calls for his disqualification.

Canon 3C provides:

C. Disqualification:

(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might *reasonably* be questioned, including but not limited to instances where:

(a) He has a *personal bias or prejudice concerning a party,* or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) He served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer in the matter, or the judge or such lawyer has been a material witness concerning it.

(c) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a *financial interest in the subject matter in controversy* or in a *party to the proceeding,* or *any other interest* that could be *substantially affected by the outcome* of the proceeding;

(d) He or his spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person:

(i) Is named a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is known by the judge to have an *interest* that could be *substantially affected by the outcome* of the proceeding;

(iii) Is to the judge's knowledge likely to be a material witness in the proceeding;

(2) A judge should inform himself about his personal and fiduciary financial interests and should make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) *"Financial interest"* means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal or civic organization or institution is not a "financial interest" in securities held by the organization or institution;

(iii) The proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome

> of the proceedings could substantially affect the value of the securities.
>
> [Emphasis added]

The factual basis for Nationwide's claim of "interest" is that Justice Embry has pending a separate bad faith claim against another insurance company (Blue Cross-Blue Shield of Alabama) concerning medical benefits not paid properly under Justice Embry's group coverage as a state employee. Such a speculative, remote interest is obviously not a "financial interest in the subject matter in controversy or in a party to the proceeding" as defined by the foregoing provision. Alabama law also makes clear that such a bare expectation, which must still be passed on by a trial judge and jury as well as an appellate court where disqualification *would* take place, is not the type of "other interest that could be substantially affected by the outcome of the proceeding." As the Alabama Supreme Court explained in *Ex parte State Bar Association*, 92 Ala. 113, 8 So. 768 (1890):

> The interest which will disqualify must be a pecuniary one, or one affecting the individual rights of the judge. . . . [T]he liability or pecuniary gain or relief to the judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of law upon the *status* fixed by the decision.
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> 92 Ala. at 118 [Emphasis by the court].

This interpretation of what constitutes a disqualifying interest is in accordance with the views expressed in *Duplan Corp. vs. Deering Milliken, Inc.*, 400 F. Supp. 497 (D.S.C. 1975), cited with approval by the Alabama Supreme Court in *Hartman vs. Board of Trustees of the University of Alabama*, 436 So. 2d 837 (Ala. 1983). In *Duplan Corp.*

the district judge noted that successful disqualification motions have been "an unusual and extraordinary occurrence" and explained:

> The initial requirement is universally accepted: bias and prejudice is never implied but must be established by clear averments. It has also been said that bias and prejudice must be shown by the conduct of the trial judge and may not be presumed or inferred from his subjective views. Judge Craven of the United States Court of Appeals for the Fourth Circuit has said that "[i]t is hornbook law that attitude or feeling a judge may entertain *toward the subject matter of a case does not disqualify him.*"
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> 400 F. Supp. at 513 [Emphasis added]

Nationwide's complaints of "interest" on the part of Justice Embry arise solely from his supposed views on the subject matter of bad faith. As the commentary to section 3.42 of the American Bar Association Standards Relating to Appellate Courts observes, an appellate judge's views on the law "are not properly subject to disputation through the recusal procedure." Justice Embry can gain no pecuniary benefit from the result in this litigation. Consequently, the law does not suggest his disqualification. This analysis is fully in accord with the modern authorities and in no way offends the general constitutional concepts of the right to a fair and impartial tribunal cited by Nationwide.

It is also apparent that the procedures utilized by the Alabama Supreme Court in ruling on the motion to disqualify comport with the modern approach to disqualification and the requirements of due process of law. Disqualification in this context is discretionary. As Chief Justice Torbert pointed out in his special concurrence to the mo-

tion to disqualify in *Aetna vs. Lavoie*, the alleged disqualification here is more subjective than objective—it is one which "addresses itself to the ethical judicial conscience of each justice applied in accordance with the established rules of law." App. F, p. 106a. Justice Maddox set forth those established rules of law in his own special concurrence to the motion to disqualify in *Aetna vs. Lavoie*, where he concluded that the question of recusal of an appellate judge is best decided by the judge himself. App. F, p. 111a. Any erroneous determination on the part of an appellate judge is further safeguarded by the participation of the other members of the court. As the commentary to section 3.42 of the Standards Relating to Appellate Courts explains:

> In the collegial decision-making of an appellate court an individual judge's purely personal views are of less significance than they would be in a trial court and he is subject to collegial restraint should he be inclined to act on them; an appellate judge has few occasions for exercising the broad discretion reposing in a trial judge; and in appellate litigation there is no occasion for the intense personal interaction between the judge and the lawyers and litigants that may occur in a trial court. Moreover, an appellate judge's established views on law and justice, at least up to a point, are a proper element of the contribution he makes to the function of an appellate court, particularly in the development of the law. A peremptory challenge might easily be abused to exclude a judge solely because a litigant disagreed with his views.
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> *See* special concurrence of Justice Maddox, App. F, p. 112a.

When presented with the motion to disqualify the Alabama Supreme Court referred the question of recusal

to each of its individual members in accordance with the foregoing procedures. This approach is consistent with that utilized in other jurisdictions and in this Court. See e.g., *Laird vs. Tatum,* 409 U.S. 824 (1972); *United States vs. Haldeman,* 559 F.2d 31, 129-131 (D.C. Cir. 1976), *cert. denied* 97 S. Ct. 2641 (approving Judge Sirica's methodology of ruling on a motion challenging him under former provisions 28 U.S.C. § 144 and § 455); *In re Estate of Carlton,* 378 So. 2d 1212, 1216 (Fla. 1980). Each of the justices determined individually that he or she was not disqualified. Although given the opportunity to do so, the Alabama court as a whole declined to disqualify Justice Embry, fully aware of his claim against Blue Cross-Blue Shield and the part he played in the decision-making process in this case. More importantly, each of the other members of the court declined to recuse themselves, so that the disqualification of Justice Embry, if successful, would not result in any change in the court's ruling. Nationwide has presented no legitimate basis for assuming any bias on the part of any other member of the Alabama Supreme Court. Under these circumstances the ruling of the Alabama Supreme Court in no way infringes Nationwide's constitutional rights, nor does it provide any other basis for review by certiorari in this Court. Nationwide's claims of unconstitutional bias are "no more than the speculative musings of a losing litigant." See *Kinnear-Weed Corp. vs. Humble Oil and Refining Co.,* 441 F.2d 631, 634 (5th Cir. 1971).

B. Petitioner's federal constitutional challenges were either never raised in the state courts or they were not raised in timely fashion.

At pages 13-17 of its Petition for Writ of Certiorari Nationwide contends that the verdict and judgment against it are unconstitutional as violative of the Ex Post Facto Clause, the Excessive Fine Clause, and the Contract

Clause. It also contends that its right of access to the courts and to assistance of legal counsel has been chilled,[8] and that the imposition of Alabama's supersedeas penalty, § 12-22-72, Code Ala. 1975, denies it equal protection under the Fourteenth Amendment. Of these claims, only the Ex Post Facto Clause was *ever* mentioned in the state courts, and even that claim was not raised until application for rehearing, which under Alabama appellate practice is too late. Consequently, Nationwide's attempts to ground certiorari on these constitutional provisions are without merit and should be rejected.

In *Cardinale vs. Louisiana,* 394 U.S. 437 (1969) and more recently in *Illinois vs. Gates,* 462 U.S. 213 (1983), this Court emphasized that on certiorari it will not decide federal questions which have never been raised, preserved, or passed upon by the state court whose judgment is under review. Application of the principles detailed in those decisions forecloses consideration of Nationwide's claims based on the Excessive Fine Clause, the Contract Clause, right of access to the courts and to the assistance of legal counsel, and the supersedeas penalty. None of these claims were by any interpretation "brought to the attention of the state court with fair precision and in due time." *Street vs. New York,* 394 U.S. 576, 584 (1969). Nationwide has not been able to cite to the Court where these questions were raised in the state courts since the size of the judgment against it was never challenged in

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8. In the context of this argument Nationwide continues to assert that Clay's insurance claim was, as a matter of law, at least partially debatable. See Petition p. 15. This position has, however, been rejected by the trial court, the jury, and the Alabama Supreme Court.

this fashion. Additionally, unlike the appellant in *Aetna vs. Lavoie,* Nationwide chose not to contest application of the supersedeas penalty to it, either at the time it formally came into operation or at any time prior to that, even though Nationwide knew throughout the appellate proceedings that the penalty would ultimately be imposed if Nationwide did not win on appeal.

Only Nationwide's claim under the Ex Post Facto Clause was even arguably raised in the state courts, but even that claim was not raised in timely fashion.[9] It first appeared at the end of Nationwide's argument in support of its application for rehearing. App. E, p. 91a-92a. Numerous Alabama cases set forth the rule that the Alabama appellate courts will not consider constitutional questions which were not raised in the court below, nor will they consider questions raised for the first time on application for rehearing. See e.g. *Home Indemnity Co. vs. Anders,* 459 So. 2d 836, 840 (Ala. 1984); *Woodham vs. Woodham,* 387 So. 2d 150, 151 (Ala. 1980); *Cooper vs. Green,* 359 So. 2d 377, 378-9 (Ala. 1978); *Kirkland vs. Kirkland,* 281 Ala. 42, 49, 198 So. 2d 771 (1967); *Austin vs. Pepperman,* 278 Ala. 551, 572, 179 So. 2d 299 (1965).

Nothing in this case indicates that the Alabama Supreme Court did not follow this standard practice when confronted for the first time on application for rehearing with a constitutional challenge to the amount of the judgment. These constitutional arguments are all claims

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9. As Nationwide recognizes in its Petition, the Ex Post Facto Clause limits only the powers of the legislature and not the judiciary, and applies in the criminal context, neither of which is present here. See Petition, pp. 13-14.

which should have been presented at the very latest in Nationwide's post-trial motions, when it knew that it faced a substantial punitive judgment under the law of bad faith. Under Alabama's procedural requirements these claims were not subject to review in the Alabama Supreme Court, and under this Court's prior decisions they are not subject to review on certiorari in this Court.

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CONCLUSIONS

Contrary to Nationwide's assertions, this case is not comparable to *Aetna vs. Lavoie,* an appeal in which this Court has noted probable jurisdiction. In that case issues were raised in the state court that serve as grounds for appellate jurisdiction and possibly jurisdiction by certiorari in this Court. Those same claims were not preserved by Nationwide in these proceedings. Furthermore, the challenge to Justice Embry's participation has at least some substance in *Aetna vs. Lavoie,* where he authored the 5-4 decision. It can result in no modification of the 6-3 ruling in the present case.

Nationwide should not be granted certiorari to review issues it has not timely raised simply because another party in an entirely separate proceeding did raise those issues. Nationwide's Petition for Writ of Certiorari establishes no conflict between the decision of the Supreme Court of Alabama and the decisions of other state or federal courts, nor does it show that the Alabama court decided any important question of federal law. Clay has awaited payment of the disability benefits to which he is entitled for over five years. Consequently, he submits that it would

be inappropriate for his receipt of these funds to be delayed any further absent a clear showing by Nationwide that it has a valid basis for certiorari in this Court on the merits of its *own* case.[10] For these reasons the Respondent Henry Gerrard Clay would urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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10. Compare note 9, Petition, p. 18.